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No. 91-1194

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MELLON BANK, N.A.,
and
GRANT STREET NATIONAL BANK (IN LIQUIDATION)
Respondents,

vs.

METRO COMMUNICATIONS,INC. t/a METROSPORTS
Respondents,

vs.

THE COMMITTEE OF UNSECURED CREDITORS
Petitioners.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Petitioner, the Committee of Unsecured Creditors of Metro Communications, Inc. ("Committee"), replies to specific arguments and assertions of the Respondents, Mellon Bank, N.A. and Grant Street National Bank (In Liquidation) (collectively "the Banks") first raised in their Joint Brief in Opposition to Petition for Certiorari ("Resp. Petition Brief, p.__.").

I. The "Undisputed Facts" Assertion Is Insincere

The Banks have repeatedly characterized this case as one that involves essentially "undisputed facts." Resp. Petition Brief, p. 12, 15. After nearly six (6) years of litigation, this assertion is largely insincere. The Banks have presumably made this assertion so that they can argue that the "clearly erroneous standard" does not apply to this case, as they have. Resp. Petition Brief, p. 12.

While much of the documentary evidence was stipulated to by the parties[1], many of the particular statements of the eight trial witnesses were hotly disputed as to weight and credibility.

The Banks have not, however, specifically

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[1] The list of stipulated documents include the "Goldberg-Klompus memorandum", the impact of which is hotly contested. Mellon Bank stipulated to the admissibility of these memorandum as "business records" *of Metro Communications, Inc.* ("Metro"). *See* Record on Appeal to the Third Circuit ("ROA") at 1033A-1064A.

disputed the four (4) key factual findings of the Bankruptcy Court, that:

(1) the chief executive officer ("CEO") of the company was Nelson L. Goldberg and he was located in Pennsylvania (Appendix to Petition for Certiorari ["App. __."] at p. 70);
(2) the chief financial officer ("CFO") of the company was Gail Schelat and she was located in Pittsburgh (App. 70);
(3) all funds due the company came to Pittsburgh, by early September, 1984 (App. 72, 59-60); and
(4) all accounting and financial services of the company were consolidated in Pittsburgh shortly after the acquisition (App. 71)[2] (collectively "the unchallenged factual findings").

The trial court's finding that the "chief executive office" of Metro was in Pittsburgh is undeniably "plausible" in light of these findings. The Circuit viewed the evidence differently, "but where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous". *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985).

II. The "Clearly Erroneous Standard" Applies To All Category Of Facts

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[2] The Third Circuit endorsed this finding. App. 18, note 1. This finding alone suggests Pittsburgh was the proper place to look for *credit information*.

The Banks argue that there is a meaningful distinction between "narrative" facts, "subsidiary" facts and "ultimate" facts, stating:

> ... regardless of the way in which the process is labeled ... the ultimate end of such a process ... is not a "fact" at all but rather a "legal inference from other facts." As such, it is subject to review free of the restraining impact of the so-called clearly erroneous rule applicable to ordinary findings of fact by the trial court. *Lehman v. Acheson*, 206 F.2d 592, 594 (3d Cir. 1953).[3]

This argument incorrectly assumes that all inferences from "narrative" facts are "legal" in nature. For example, one can reasonably infer that the "chief executive officer" of a company oversees the important operational and financial management of a company because, in common parlance and experience, most chief executive officers do just that. There is no legal analysis involved, no application of a rule of law to a "narrative" fact.

An inference from a narrative fact may involve only "ordinary principles of logic and common sense". Unless a legal determination is involved, the distinction between the "type" or "level" of facts is irrelevant.

The "clearly erroneous standard":

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[3] Resp. Petition Brief, p. 11.

> does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

Pullman-Standard v. Swint, 456 U.S. 273, 278, 102 S.Ct. 1781, 72 L.Ed.2d 66, 79 (1982).

III. The "Undue Weight" Arguments are Irrelevant

The Banks also argue that:

> The difficulty these cases present is not resolving disputed issues of fact but rather sifting through the mass of evidence to determine which facts are relevant and which of the relevant facts are entitled to the most weight.[4]

While the Third Circuit *may* have "sifted through a mass of evidence," their discussion of specific evidence

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[4] Resp. Petition Brief, p. 12.

was extremely limited.[5]

The Banks carry the "undue weight" argument further, stating:

> 1) The Third Circuit concluded that Bankruptcy Court gave too much weight to internal memorandums sent by Klompus to Goldberg ...
>
> 2) The Third Circuit thought the Bankruptcy Court had given undue weight to the consolidation of Metro's accounting and cash management functions[6] with those of its affiliates in Pittsburgh ...[7]

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[5] The Circuit's discussed: 1) memorandum between Klompus and Goldberg (Metro's Maryland Based President and its Pittsburgh based CEO); App. 17: ROA 1033A-1064A; 2) an October 5, 1984 letter contract (executed by Metro's Pittsburgh based CFO, Gail Schelat); App. 18-19; ROA 867A-869A; 3) a tax form filed in early 1985 (prepared and executed in Pittsburgh); App. 19; ROA 802A,803A, 811A, 386A-387A, 397A; and 4) two "press releases, one dated July 12, 1984 (issued from New York City), and one dated November 19, 1984 (issued from Pittsburgh); App. 19-20; ROA 1204A-1205A, 980A. Most of this evidence supports the Bankruptcy Court finding, however, it represents very small percentage of the one hundred fifty-two trial exhibits (655 pages) and *none of the testimonial evidence* from the eight witnesses.

[6] The Circuit endorsed this finding. App. 18, note 1. This finding alone suggests Pittsburgh was the proper place to look for *credit information*.

[7] Resp. Petition Brief, p. 14.

While Petitioner believes that the Circuit misconstrued the "internal memorandum" [8], and unreasonably discounted the "consolidation of financial management" [9], these arguments are irrelevant because "determining the weight and credibility of the evidence is the special province of the trier of fact." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 856, 102 S.Ct. 2182, 2189, 72 L.Ed.2d 606 (1982).

IV. The "Perfect Harmony" Assertion Is Incorrect

The Banks conclude, saying:

> **The Third Circuit's analytical approach is in perfect harmony with the *two other leading circuit court decisions in this area.*** [10]

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[8] *See* Petition for Certiorari ("Petition"), p. 20. The Circuit thought that these memoranda were *intercorporate* (between, TCS and Metro ... "affiliated corporations") rather than *intracorporate* (between two officers of Metro) App. 17. The subject matter of the these documents concerned Metro business. ROA 1033A-1064A. Leonard Klompus had no management role in TCS. **Mellon stipulated that they were "business records" of Metro.**

[9] The comment to 13 Pa. C.S.A. §9103 states, in part: "Chief executive office ... is the place where person dealing with the debtor would *normally look for credit information* and is the appropriate place for filing."

[10] Resp. Petition Brief, p. 21. (Referring to *Jarboe v. United Bank of Denver (In re Golf Course Builders Leasing Inc).*, 768 F.2d 1167, 1170-1171 (10th Cir. 1985); *Akoi v. Sheperd Machinery Co. (In re J. A. Thompson & Son, Inc).*, 665 F.2d 941, 950, 33 UCC 356, 366-67 (9th Cir. 1982); (hereinafter *Jarboe* and *Akoi*, respectively).

The Bankruptcy Court analyzed the evidence according to categories[11] largely drawn from the *Akoi and Jarboe*. The Circuit responded that "the Bank's rightly criticize the *mechanistic* application of factors deemed relevant in other cases". App. 16. The Circuit did not explain why this type of evidence was not relevant to this case, though it did state:

> ... when one corporation is acquired by another, the nature of the inquiry ... must be tailored to that situation.

App. 16.

If anything, an acquisition of a small, Maryland-based company by a Pennsylvania based group of companies indicates more of a possibility of a "chief executive office" change, than without acquisition.

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[11] The categories include:

> (1) existence of office autonomy; (2) location of officers and directors; (3) office from which the annual report is generated; (4) location of financial records, including bookkeeping functions, tax preparation and maintenance of payroll; (5) office from which business is negotiated and contracts are executed; (6) location which generates the greatest revenues; (7) area in which the majority of debtor's creditors are located; and (8) location from which primary accounting and legal services are rendered. App. 68.

Unlike *Jarboe*, the Third Circuit emphasized a press release of the Debtor.[12] Even if this press release was issued by the debtor,[13] reliance on this representation[14] is in direct conflict with the Ninth Circuit's holding that:

> the creditor is not entitled to rely on representations of the debtor as to the latter's chief place of business ... creditors have a duty to acquaint themselves with facts necessary to enable them to enable them to file in accordance with the Commercial Codes.

Jarboe, 665 F.2d at 950 (9th Cir. 1982).

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[12] The Third Circuit called the November 19,1984 press release "the most telling piece of evidence." App. 19. *See* ROA 980A.

[13] This release was issued from *Pittsburgh* and states: "Merged in June, TCS/Metrosports said today that the Metrosports headquarters, previously in Rockville, Maryland, are being moved...effective December 3." ROA 980A. There was no evidence presented that TCS and *Metrosports* were legally merged, TCS was the grandparent of Metro Communications, Inc. **Metrosports stationary portrayed Metrosports as *a division of Metro Communications, Inc.*** ROA 838A, 841A, 852A, 893A, 972A. The CEO and CFO of the TCS and Metro were the same, Pittsburgh based, personnel. ROA 525A, 1204A, 336A, 339A.

[14] If, after considering all the other evidence, the Bankruptcy Court properly determined that the debtor moved its "chief executive office" to Pittsburgh before October, 1984, a statement of the debtor made two months later would be irrelevant. *See* App. 73.

V. There Is But One Standard And It Is Factual

The Banks argue that the Bankruptcy Court erred in applying the "dual faceted standard of law," focusing on (i) the main part of the debtor's business operation and (ii) the reasonable expectations of the creditors. Resp. Petition Brief, p. 7.

The Uniform Commercial Code ("UCC") provision simply provides, however:

> (2) The law ... of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or nonperfection of the security interest.
> (4) A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business.[15]

There is but one determination under the UCC, it is the determination of "chief executive office." The comment explains that "chief executive office":

> ... *means the place from which in fact the debtor manages* the main part of his business operations. *(because)* This is the place where persons dealing with the debtor would *normally look for credit information* and is the appropriate place for filing.

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[15] 13 Pa. C.S.A. §9103, Act 1979, Nov.1, P.L. 255, No.86.

Parenthetical added.[16]

The rationale of choosing the "chief executive office" as the test is stated in "theoretical" or "hypothetically" terms, not "actual" terms. To read "actual expectation of the creditors" into the determination of "chief executive office" [17], as the Circuit has, confuses the rationale for the test with the test itself, the "subjective" with the "objective", the "actual" with the "theoretical".

CONCLUSION

The petition for certiorari should be granted and this Court should exercise its supervisory power.

Respectfully submitted,
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[16] The Third Circuit assumed the implied "because" in the comment, as does the petitioner. The text of the Third Circuit decision confirms it. App. 16.

[17] Even if the consideration of actual creditor expectations is proper, these expectation must have been influenced by the flow of funds to and from Pittsburgh. *See* third and fourth "unchallenged factual finding", p. 2, *supra*. *See also* Petition, p. 23, note 40.